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DOLLAR TREE STORES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KASSONDRA BAAS and KELLY LOFQUIST, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOLLAR TREE STORES, INC.,

Defendant.

CASE NO. C 07-03108 JSW

DEFENDANT DOLLAR TREE STORES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

DATE: April 4, 2008
TIME: 9:00 a.m.
DEPT.: Crtrm. 2, 17th Floor
JUDGE: Hon. Jeffrey S. White

COMPLAINT FILED: June 13, 2007
TRIAL DATE: No date set.

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SUMMARY OF ARGUMENT

This lawsuit alleges that Defendant has wrongfully manipulated all hourly employee time records **throughout the state of California**. At issue here is whether class action treatment is appropriate. It is not. Dollar Tree operates more than 220 stores throughout California. But Plaintiffs worked in only a single store, and they have narrow evidence of wrongdoing primarily in two stores, which are both located within the same 12-store district (District No. 460). Absent any supporting evidence, Plaintiffs cannot maintain a class action by limited anecdotal observation. Evidence suggesting that two or three individual Store Managers in the same district altered time entries simply cannot be used to bootstrap a state-wide class action involving thousands of employees at hundreds of different stores. *See Castle v. Wells Fargo Financial, Inc.*, 2008 WL 495705 (N.D. Cal. Feb. 20, 2008) (Illston, J.). To the contrary, a statistical analysis prepared by Robert Crandall shows no evidence of any systematic adjustments at any level. And this is confirmed by the evidence Baas cites. *See* Crandall Decl. at Ex. A (¶¶ 30-32); Anthony Decl. at ¶ 4; Objections to Evidence at ¶ 22.

The proposed class is also not appropriate for certification because the interests of the Assistant Managers clash with those of the hourly employees under their supervision. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Assistant Managers are responsible (along with Store Managers) for reviewing time records and ensuring their accuracy. Since Plaintiffs and other Assistant Managers were charged with the responsibility of ensuring the accuracy of subordinate hourly employees' time records, they cannot adequately represent a combined class of all hourly employees. Additionally, counsel for Plaintiffs has a conflict. The Edgar Law Firm simultaneously represents John Hansen ("Hansen") in a wage and hour lawsuit against Dollar Tree pending before this Court. Hansen is the very same Store Manager Plaintiffs say manipulated their time records. Already, Plaintiffs have given sworn testimony that cannot be reconciled with Hansen's sworn testimony. In sum, class certification is not appropriate under Rule 23.

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I. STATEMENT OF FACTS

Dollar Tree Stores, Inc. ("Dollar Tree") is a public company with its headquarters in Chesapeake, Virginia. It is a single price point discount variety store retailer. Dollar Tree operates over 3,000 retail locations nationwide including approximately 220 stores in California. *See* Declaration of Paula Brady at ¶ 3. Dollar Tree's California stores are divided into 24 separate districts. Each district is comprised of approximately 10-12 stores. *See* Declaration of David McDearmon at ¶ 6. Plaintiffs are both former employees of Dollar Tree. They worked from October 2005 through February 2007 as hourly (i.e., non-exempt) Assistant Managers at a single store in Rohnert Park, California (Store No. 1868). Compl. at ¶¶ 12-15.

A. Dollar Tree's Payroll Policies.

Dollar Tree's written payroll and wage policies comply with California and federal law. Dollar Tree requires its employees to record accurately the hours they work, including the actual time taken for their meal breaks. *See* Brady Decl. at ¶ 7, Ex. B. Store Managers and Assistant Managers were trained in Dollar Tree's policies, and were required to communicate these policies to all store hourly employees. *See* McDearmon Decl. at ¶¶ 7-9. Dollar Tree's employees, including Plaintiffs, were expected to comply fully with these policies. *Id.* The applicable Wage Orders are also posted in each Dollar Tree retail store for all employees to read. *See* McDearmon Decl. at ¶ 13.

All hourly employees are issued unique employee numbers and access codes, which they are prohibited from sharing with others for security reasons. *See* Declaration of Steve Pearson at ¶¶ 5 & 7. Using this information, time may be entered electronically both at the cash register terminals and on a computer kept in the store's office. *Id.* at ¶ 5. These devices are connected to a time tracking system known as Compass.[1] *Id.* at ¶ 4. All hourly employees are to use Compass to record every start and end of shift, and all breaks. *See* Brady Decl. at ¶¶ 7 and 8, Exs. B and C. Since

[1] Dollar Tree began using Compass to track employee time on or about June, 2006. Prior to that, Dollar Tree used a time keeping system called Fastech. *See* Pearson Decl. at ¶ 9.

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employees sometimes neglect to clock in or out and occasionally the system malfunctions, Assistant and Store Managers are able to adjust the time records for any employee in their store other than themselves. *See* Pearson Decl. at ¶ 6.

When any correction is made, Compass maintains a footprint of the original entry, identifies the correction, identifies who made the correction, and shows the date and time the correction was made. *Id.* at ¶ 8. Dollar Tree can generate, on a store-by-store level, "punch audit reports" from Compass which show each of the foregoing trails for each hourly employee. *Id.* If a time entry is subsequently changed, then more than one punch will appear for the same type of entry (e.g., two entries for a start shift). Each entry will have a trail as to the time and date when it was made and by whom. However, the punch audit reports do not identify why a change was made. As a result, it is impossible to discern from them whether a change was made to correct an error or if it was made in contravention of Dollar Tree policy. Hansen Dep. 635:9-23. Cruz Dep. 454:1-455:15. Plaintiffs have asserted that they intend to rely on the punch audit reports to establish their case. Berman Decl. at ¶ 3, Ex. A (p. 5 lines 9-14). But Plaintiffs have **no** evidence, either contemporaneous or otherwise, identifying the purpose of any particular change recorded on any particular punch audit report.

B. Statistical Data from Punch Audit Reports.

Plaintiffs allege that Dollar Tree made adjustments to reduce overall payroll hours. *See* Opening Brief at 4:5-9. Yet for the entire putative class, less than one percent of employee days had time adjusted so as to result in a net loss of time. Crandall Decl. at Ex. A (¶ 3). Thus, even if all adjustments which led to a loss of time were improper (and they were not), the adjustments would affect fewer than one percent of the employee days. The Fastech data shows that sixty-five percent of all employees had no days where an edit resulted in a reduction in hours. *Id.* at Ex. A (¶ 17). Of the thirty-five percent who had edits that resulted in a loss, the frequency of negatively edited days does not reach 1% until the 80th percentile. *Id.* The Compass data shows that seventy percent of employees had no edit reductions to his or her time records. *Id.*

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at Ex. A (¶ 18). Of that thirty percent that did, the typical employee did not have negative edits that exceeded 1% until the 86th percentile. *Id.* The mean for edits resulting in a loss of time is less than one percent of all employee days. *Id.* at Ex. A (¶ 17). Such records demonstrate not only that Dollar Tree did not improperly alter time records but also that Plaintiffs' claims, if true, are neither typical nor common.[2]

Second the Plaintiffs allege that Dollar Tree made adjustments to subtract time worked to avoid payment of overtime wages. In the Fastech data, only eighteen percent of the negative edits caused an eight-plus hour day to become a day of eight hours or less. Id. at Ex. A (¶ 25). This means that only 0.12 percent of employee days were adjusted to less than eight hours. *Id.* In the Compass data, only twenty percent of the negative edits caused an eight-plus hour day to become a day of eight hours or less. *Id.* Thus, negative overtime adjustments affected fewer than 0.08 percent of the employee days. *Id.*

Lastly, the Plaintiffs allege that Dollar Tree made adjustments to subtract time worked to fewer than five hours to deprive employees of an entitlement to meal periods. In the Fastech data only twelve percent of the negative edits adjusted an employee's time below five hours. *Id.* This means only 0.08 percent of employee days were adjusted to less than five hours. *Id.* Under the Compass data, only seven percent of the negative edits resulted in an employee's time falling below five hours. *Id.* Thus, only 0.02 percent of employee days were edited to reduce an employee's time to under five hours. *Id.*

The statistics clearly show that there is no state-wide policy to deprive employees of time worked for any reason. Of the less than one percent of employee days edited, seventy percent of the edits have no effect on either entitlements to meal breaks or overtime wages. *Id.* Moreover, the number of employees whose time was

[2] Additionally, not all time edits are negative. Adjustments that actually added time to the employee's punches were more common. Crandall Decl. at Ex. A (¶ 3).

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negatively adjusted, for whatever reason, is so small that there is no commonality across the proposed class.

Even when reviewing the punch audit reports for stores in the same district as Store No. 1868, there is no pattern of adjusting time records downward, as the data demonstrates. *Id.* at Ex. A (¶¶ 26-32). Indeed, some stores in the same district as the Plaintiffs' store had no corrections to employee's time, while others had corrections, but none that would affect overtime compensation, or if affected, so infrequently and in such small quantities that no improper purpose could be inferred. *Id.* at Ex. A (¶¶ 26-29). Moreover, the evidence shows that Dollar Tree paid overtime to employees appropriately. Dollar Tree did not discipline the Store Managers for incurring overtime. *See* Brady Decl. at ¶ 9.

Plaintiffs' papers repeatedly suggest evidence of state-wide violations. *E.g.*, Opening Brief at 1:19 ("chronic" violations); 13:11-13. Yet these claims are universally made without citation. Nor is the claim that there are "hundreds of instances of time shaving by over a dozen different managers" supported by the record. Opening Brief at 5:1-8. While "Exhibit C" to the Baas Declaration purports to show a "practice" among 12 stores in Northern California, only six stores are reflected on Exhibit C and the great majority of cited punch edits are from two stores (Nos. 1868 and 2262) under three store managers, Burger, Hansen and Cruz. Indeed, of the 202 entries depicted on Exhibit C, only 13 are from stores other than 1868 and 2262. See Anthony Decl. at ¶ 4; Objections to Evidence at ¶ 22; Crandall Decl. at Ex. A (¶ 31). Moreover, as explained by Mr. Crandall, the data Baas relies upon only underscores the conclusions reached by Dollar Tree—i.e., the most common experience for employees is to experience no negative time edits, and those who did experience such edits did so very infrequently. See Crandall Decl. at Ex. A (¶¶ 30-31).

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II. ARGUMENT

A. Plaintiffs Will Be Unable To Prove The Necessary Pre-Requisites For This Action To Be Certified As A Class Action.

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (internal citation omitted). A class action may be certified only if "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addition to satisfying these prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2) or (3). *See* Rule 23(b); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b)(3) permits class actions when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

The party seeking class certification bears the burden of establishing that all requirements of Rule 23 have been met. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The merits of the class members' substantive claims are generally irrelevant to this inquiry. *Eisen*, 417 U.S. at 177-78. However, courts are "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case," and a court may only certify a class after a "rigorous analysis" as to whether the requirements have been satisfied. *Dataproducts Corp.*, 976 F.2d at 509 (internal quotations omitted).

B. Plaintiffs Do Not Satisfy the Requirements of Rule 23(a).

Under Rule 23(a), the party seeking class certification must establish: (1) that the class is so large that joinder of all members is impracticable (i.e.,

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numerosity); (2) that there are one or more questions of law or fact common to the class (i.e., commonality); (3) that the named parties' claims are typical of the class (i.e., typicality); and (4) that the class representatives will fairly and adequately protect the interests of other members of the class (i.e., adequacy of representation). *See* Fed.R.Civ.P. 23(a). The parties do not dispute the numerosity issue.

1. Commonality Is Absent Among The Proposed Class Members.

The requirement of commonality "seek[s] to assure that the action can be practically and efficiently maintained [as a class action]." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Commonality focuses on the relationship of common facts and legal issues among class members. "Class treatment makes no sense if there are no common issues; the trial court would gain nothing but logistical headaches from the combination of the cases for trial." *Id.* at 55.

To demonstrate commonality, plaintiffs must show at least one significant issue of fact or theory of law common to the entire class. *See Hanlon*, 150 F.3d at 1020. In an attempt to establish commonality, Plaintiffs argue, **without citation to any evidence**, that "many, many of Dollar Tree's hourly employees received reduced wages due to post-entry alteration of their time records prior to payroll processing." *See* Opening Brief at 7:27-28. Yet nothing supports this assertion. To the contrary, less than 1% of all hourly employee days were edited to have time reduced for any reason. Crandall Decl. at Ex. A(¶ 3). Stated another way, on any given day, more than 99% of Dollar Tree's hourly employees in California had no negative adjustment to their time. Moreover, there is no evidence that time records were altered improperly in any store other than stores 1868 and 2262. Consequently, Plaintiffs can point to no common fact to support their claim that Dollar Tree improperly altered time clock records to reduce overall payroll on a state-wide basis.

If Plaintiffs' are correct that Dollar Tree's Compass system enabled management on a state-wide basis to reduce employee time to deprive them of time worked, then there should be state-wide evidence of time adjustments reducing the

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amount of time that employees worked. In fact, the extremely low number of time corrections state-wide suggests the opposite – Dollar Tree's use of the Compass system is remarkably accurate in properly recording and capturing all time worked. As shown above, for the entire putative class, less than 0.7 percent of employees' days had time adjusted negatively. *Id.* at Ex. A (¶ 10). The fact that less than 0.7 percent of employee days time entries were altered does not suggest that Dollar Tree has a policy of depriving its employees of payment for all time worked. The median employee had his or her time adjusted zero percent of the time. *Id.* at Ex. A (¶¶ 17-18). In other words, the "most common" employee has experienced no negative time adjustments. *Id.* at Ex. A (¶ 19). It strains reason to certify a class of thousands when only 0.7 percent of employee days were negatively adjusted.

Moreover, isolated findings of alterations will not be applicable class wide. There are many proper reasons for manual adjustments to time. Hansen Dep. 274:11-275:5. Because it is not possible to tell from Compass (or Fastech) alone the reason time was adjusted, each adjustment will have to be examined on an individual basis. See, e.g., Hansen Dep. 286:15-287:21; 586:16-21; 587:16-24; 605:7-606:19; 651:14-652:8. If each time alteration will have to be examined, the fact the time entry was adjusted does nothing to establish commonality across the entire putative class.

For example, the plaintiffs in *Castle* sought to certify a nationwide class of Wells Fargo employees based upon the allegation that Wells Fargo utilized a timekeeping system which allowed management to deprive the hourly employees of overtime compensation by manipulating time records. *See Castle*, 2008 WL 495705 at 5. The plaintiffs submitted declarations from individual employees all stating that they were not paid for some amount of overtime worked, and that they were pressured by their managers not to record overtime hours. Judge Illston found that if the declarants were able to prove the facts in their declarations, they would have strong individual claims. However, commonality did not exist because "plaintiffs have not identified any company-wide policy or practice to deny overtime and thus have failed to show that the

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various Wells Fargo employees are similarly situated for purposes of class certification." *Id.* at 5. Rather, "[a]t the most, plaintiffs' evidence suggests differing 'policies' or practices depending on the branch or the district, rather than on a nationwide basis." *Id.*

Plaintiffs worked at only one store during a combined timeframe of October 2005 through February 2007. Compl., ¶¶ 13 and 15. Crediting fully Plaintiffs' allegations and those of their witnesses – Hansen and Cruz, it is apparent that, at most, they have information about what two or three store managers did in a single district. Upon this localized observation, they cannot support a state-wide claim against Dollar Tree. Certifying a class of thousands when time alterations occur to less than one percent of the employees will create the logistical headaches the commonality requirement was designed to prevent. *Cornn v. United Parcel Service, Inc.*, No. 2005 WL 2072091 at *5 (N.D. Cal. Aug. 26, 2005) ("Because the Court cannot determine whether a driver performed work during the interval in question without undertaking individualized inquiries that predominate over any common questions, class certification would be inappropriate.").

2. Plaintiffs' Claims Are Not Typical Of The Proposed Class Of Hourly Employees.

The claims of Plaintiffs must be typical of the claims of the class. To be considered typical for purposes of class certification, the claims of the putative class must be "fairly encompassed by the named plaintiff's claims." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation omitted). The commonality and typicality requirements are similar and tend to merge. *Id.* at 157 n. 13. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Dataproducts*, 976 F.2d at 508. Plaintiffs are unable to prove that their claims are "typical" of the classes of hourly employees they seek to represent.

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First, as indicated above, Plaintiffs, both Assistant Managers, worked at a single Dollar Tree store in Rohnert Park, California during a combined timeframe of October 2005 through February 2007. Compl., ¶¶ 13 and 15. They implicate a single person, their District Manager, Mr. Tellstrom, as having allegedly directed the improper alterations. They concede that they presently do not have any facts regarding anyone other than Mr. Tellstrom. *See* RJN Exh. A, 4:15-5:3; 7:16-20. Moreover, the Plaintiffs' Store Manager cannot remember if Mr. Tellstrom actually told him to improperly adjust employees time. Hansen Dep. 273:23-274:2. In fact, Mr. Hansen states he knew the improper alterations were contrary to Dollar Tree policy. *Id.* 648:13 – 17. Thus, there is absolutely no evidence that the Plaintiffs' claims of shaving are "typical" of the hourly employees in other stores or districts.

Not only have Plaintiffs failed to provide any evidence that their claims are typical, the evidence shows exactly the opposite. Baas' time entries were adjusted fourteen percent of the time. Crandall Decl. at Ex. A (¶ 21). This is considerably higher than the frequency of edits found across the entire proposed class. *Id.* The mean frequency of adjustments using the Fastech data was 0.6 percent and for the Compass data was 0.4 percent with the median for both being zero. *Id.* at Ex. A (¶¶ 17-18). In other words, Baas' time was adjusted, for whatever reason, fifteen times more frequently than the average employee. Baas is at or above the 95th percentile in frequency of edits. *Id.* at Ex. A (¶ 21). Even within her own store she is an anomaly. Baas had her time edited with more frequency than any other employee in her store, ranking number one out of more than forty employees. *Id.* at Ex. A (¶ 22). Based on the statistics alone, Baas' claims are not typical of the class.

While not as stark as Baas, the frequency of adjustment to Lofquist's time exceeds that of the average employee. *Id.* at Ex. A (¶ 23).

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3. The Plaintiffs Do Not Fairly And Adequately Protect The Interests Of Other Members Of The Class.

Rule 23(a)(4) dictates that the representative plaintiff must fairly and adequately protect the interests of the class. To satisfy constitutional due process concerns, unnamed class members must be afforded adequate representation before entry of a judgment which binds them. *See Hanlon*, 150 F.3d at 1020 (internal citations omitted). "Absent class members must be afforded adequate representation before entry of a judgment which binds them." *Id.*

a. The Plaintiffs' Counsel Is In Conflict With The Class.

For the representative Plaintiffs' counsel to meet the adequacy requirement, the counsel must not have any conflicts of interest with other class members and must be able to prosecute the action vigorously on behalf of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). "[W]here there is reason to doubt the loyalty of counsel or the adequacy of counsel's representation, serious questions arise concerning the preclusive effect of any resulting judgment." *Cal-Pak Delivery, Inc. v. United Parcel Serv.*, 52 Cal.App.4th 1, 12 (1997). Plaintiffs' counsel, The Edgar Law Firm, currently represents Hansen and Miguel Cruz in a misclassification wage and hour lawsuit pending against Dollar Tree in this Court. Hansen is the Store Manager whom Plaintiffs allege improperly altered their time records. Hansen is also responsible for terminating Plaintiffs' employment with Dollar Tree. During her deposition, Lofquist alleged she worked off the clock stocking, in the presence of and at the direction of Hansen. Lofquist Dep. 247:4-248:17. That allegation was denied by Hansen. Hansen Dep. 547:23-548:16. Moreover, Hansen testified in his deposition that he knew it was against Dollar Tree policy to alter time records to reflect less time than an employee actually worked. Hansen Dep. 648:13-17.

Plaintiffs' allegation that Hansen violated the law is in conflict with Hansen's interests and deposition testimony. The heart of Plaintiffs' allegations is that Dollar Tree has a policy of using the Compass system to deny overtime. Hansen

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explicitly denies this allegation. Plaintiffs' allegations are clearly prejudicial to the interests of Hansen. In a class action context, "class counsel are subject to a 'heightened standard' which they must meet if they are to be allowed by the Court to represent absent class members." *Huston v. Imperial Credit Commercial Mortgage Invest. Corp.*, 179 F.Supp.2d 1157, 1167 (C.D. Cal. 2001). The Edgar Law Firm's representation of both Hansen and Plaintiffs is a clear conflict of interest.

The District Court for the Northern District of California follows California ethical standards. *In re County of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000); Civil Local Rule 11-4(a)(1). The applicable standard of conduct is set forth in Rules of Professional Conduct of the State Bar of California, Rule 3-310(c)(3), which provides as follows:

> A member shall not, without the informed written consent of each client ... [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

"A conflict of interest exists when a lawyer's duty on behalf of one client obligates the lawyer to take action prejudicial to the interests of another client ...." *Moreno v. Autozone, Inc.*, 2007 WL 4287517, *5 (N.D. Cal. Dec 6, 2007). "An 'adverse' interest is one that is 'hostile, opposed, antagonistic ... detrimental, unfavorable' to one's own interests." *Id.* (quoting *Ames v. State Bar,* 8 Cal.3d 910, 917 (1973)).

The Edgar Law Firm cannot sweep the conflict under the rug by obtaining waivers from just the named plaintiffs.[3] Waivers would have to be obtained from every class member. *See Moreno v. Autozone, Inc.*, 2007 WL 4287517 at *7. "As a practical matter, [Plaintiff's law firm] can not obtain written waiver of the actual conflicts of interest that exist from the absent class members." *Id.* "Absent each client's informed written consent, dual representation of clients whose interests actually conflict is prohibited and results in "per se or automatic" disqualification." *Id.* at *6 (citing *Flatt v. Sup.Ct.,* 9

[3] Dollar Tree has asked for, but Plaintiffs have failed to provide copies of the alleged waivers received from them. See Berman Decl. at ¶¶ 4 and 5, Ex. A.

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Cal.4th 275, 284 (1994)). Moreover, under the so-called "hot potato rule," the "dual representation conflicts cannot be cured by the expedient of severing the relationship with one of the clients." *Id.*

b. The Plaintiffs' Interests Are In Conflict With The Class.

"Adequate representation depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994) (internal citation omitted). Plaintiffs will not be able to fulfill this obligation because their interests are antagonistic to the interests of the class members they seek to represent. Plaintiffs, former Assistant Managers, had a duty to make sure the time records accurately captured all time worked by employees.

Plaintiffs, as Assistant Managers, were and are responsible for enforcing Dollar Tree's policies, particularly when the Store Manager is not present. Because Plaintiffs' and other Assistant Managers were charged with the responsibility of ensuring accurate time records were kept, they cannot adequately represent a class of hourly employees who allege tampering with their time records, particularly where the putative representatives may have done the tampering. Plaintiffs knew it was against Dollar Tree policy to shave time; yet neither complained when the Store Manager allegedly took time away from them and others. Baas Dep. 81:25-82:2; Lofquist Dep. 60:15-17.[4] Indeed, both Plaintiffs were aware of Dollar Tree's Careline whereby employees can anonymously alert Dollar Tree to violations of the law or policy. Baas Dep. 74:5-9; Lofquist Dep. 60:5-8. Neither Plaintiff contacted the Careline or any other person to voice their concerns. Baas Dep. 74:2-4; Lofquist Dep. 60:15-17; 214:9-13. Baas certainly knew what to do if her pay was incorrect; as she had previously contacted Candace Camp from Dollar Tree's regional human resources office when she was not

[4] Lofquist testified that she saw Hansen taking time away from a cashier named Tina. See Lofquist Dep. 40:21-41:12.

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getting paid an Assistant Manager's rate after her promotion. Baas Dep. 59:19-60:7. Both Plaintiffs knew how to alert Dollar Tree to problems, yet chose not to do so.

Because both Baas and Lofquist were involved in the alleged wrongful acts, their claims are not typical of the employees who may have been unwittingly harmed. *See Hanon*, 976 F.2d at 508 ("[A] named plaintiff's motion for class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it."). "Where there is a conflict that goes to the very subject matter of the litigation, it will defeat a party's claim of class representative status. Thus a finding of adequate representation will not be appropriate if the proposed class representative's interests are antagonistic to the remainder of the class." *Global Minerals & Metals Corporation v. Superior Court,* 113 Cal.App.4th 836, 851 (2003); *Richmond v. Dart Industries, Inc.,* 29 Cal.3d 462, 478-479 (1981).

The court in *Van Allen v. Circle K Corp.*, 58 F.R.D. 562, 564 (C.D. Cal. 1972), reached a similar conclusion, holding that the interests of former independent operators, who would be interested only in the fullest possible financial recovery, were adverse to current operators who wished to keep working with a financially robust defendant with a favorable public image.

4. Plaintiffs Do Not Satisfy The Requirements Of Rule 23(b).

Plaintiffs argue that it is "obvious" that varying outcomes would result from individual claims. Opening Brief at 11:5-7. But this assertion, which is always true, misunderstands the law. "[C]ertification requires more, however, than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others or to pay them different amounts." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001) (internal citation omitted). Rather, "Rule 23(b)(1)(A) authorizes class actions to eliminate the possibility of adjudications in which the defendant will be required to follow inconsistent courses of continuing conduct. This danger exists in those situations in which the defendant by reason of the legal relations involved can not, as a practical matter, pursue two different

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courses of conduct." *Id.* That is not the case here: both parties agree that time shaving is illegal and that Dollar Tree's policies prohibit time shaving.

Nor is this a case where common issues predominate. The predominance inquiry "focuses on the relationship between the common and individual issues." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152, 1162 (9th Cir. 2001). Consequently, the mere presence of common issues of fact or law is not by itself sufficient. *Hanlon,* 150 F.3d at 1022. Rather, the proposed class must be "sufficiently cohesive to warrant adjudication by representation." *Id.* at 1011. Hence, the test measures the relative weight of the common claims against the individualized inquiry. *Id.* "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Zinser,* 253 F.3d at 1189 (internal citations omitted).

In this case, the ability of each class member of the proposed class to recover depends on a separate set of facts applicable only to him or her and will require individualized proof employee by employee. Examination of the Compass system is not enough. During their depositions, both Hansen and Cruz testified that it is impossible to tell if manual alterations to time records are corrections or not. Hansen Dep. 635:9-23. Cruz Dep. 454:1-455:15. The recorded time in the Compass system would have to be compared against some other record of an employee's time, if such secondary source even exists. Each employee would have to be examined as to the alterations to prove that a violation occurred.[5] Individual inquiries would predominate over any common proof. In such cases, class certification is routinely denied because individualized issues predominate. *Mateo v. M/S Kiso*, 805 F.Supp. 761, 774 (N.D. Cal. 1991). "If the main issues in a case require the separate adjudication of each class member's individual claim or defense, a [class] action would be inappropriate." *Zinser,* 253 F.3d at 1189.

[5] For example, Jose Baeza, an Assistant Manager at Store No. 1868, testified that nothing improper ever occurred with respect to his wages. Baeza Decl. at ¶¶ 1-8 (attached to the Declaration of Translator Jose Estrada).

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Finally, Plaintiffs are unable to demonstrate that any of the common questions can be resolved by proof that applies to all class members equally. Indeed, Plaintiffs cannot present any plan to the trial Court for managing the complex issues of fact raised by the class claims. The court must balance the manageability regarding the litigation of issues common to the class as a whole against questions affecting individual class members. *Abed et al. v. A.H. Robins Company, et al.* (*In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*), 693 F.2d 847, 856 (9th Cir. 1982). This case, as a class action is not manageable, as it will quickly devolve into thousands of individual inquiries regarding the schedules of individual class members, the actions of their Store Managers and Assistant Managers, and the circumstances surrounding the manual entries into Compass and Fastech. There are over 10,000 hourly employees in the proposed class. A case of this magnitude is unmanageable when individualized issues predominate.

III. CONCLUSION

For the reasons stated above, certification of the putative class should be denied.

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Respectfully submitted,
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